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SUBANG SKYPARK SDN BHD v. ARCRADIUS SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
MARY LIM J
[ORIGINATING SUMMONS NO: 24C(ARB)-17-03-2015]
15 APRIL 2015

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ARBITRATION: *Decision of adjudicator – Stay of execution – Application for – Concurrent arbitration proceedings – Whether application for stay of adjudication decision allowed until final determination of arbitration proceedings – Whether court had discretion to grant stay – Whether cogent reasons adduced to warrant stay – Construction Industry Payment and Adjudication Act 2012, s. 16*

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CIVIL PROCEDURE: *Stay of execution – Application for – Decision of adjudicator – Concurrent arbitration proceedings – Whether application for stay of adjudication decision allowed until final determination of arbitration proceedings – Whether court had discretion to grant stay – Whether cogent reasons adduced to warrant stay – Construction Industry Payment and Adjudication Act 2012, s. 16*

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The plaintiff employed the defendant to carry out renovation and refurbishment works at the exterior and interior of the Lapangan Terbang Sultan Abdul Aziz Shah ('the works contract'). The plaintiff failed to settle certain payments to the defendant and the latter served a payment claim to the plaintiff pursuant to the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA'). The plaintiff, however, disputed the claim on the ground that the plaintiff had a valid LAD claim against the defendant for late completion of the works since the certificate of completion and compliance was only issued on 2 November 2011. The plaintiff claimed that it was entitled to set off a certain sum for the late completion of the works calculated. The matter was then referred to adjudication and the defendant's claim was allowed. However, the plaintiff's cross claim for the LAD was dismissed. A concurrent arbitration proceeding was initiated in relation to this matter in which it was argued that the plaintiff breached the works contract. *Vide* this suit, the plaintiff filed an application under s. 16 of the CIPAA and sought for the order, *inter alia*, that the enforcement and/or execution of the adjudication decision be stayed until the final determination of the arbitration proceedings. The stay application was made pursuant to the defendant's issuance of a notice under s. 218 of the Companies Act 1965 where the defendant sought to enforce the adjudication decision. The plaintiff relied on cl. 35.4 of the works contract which stipulated that since there was reference to arbitration, the adjudication decision was not final and binding and therefore, could not be enforced. Further, it was argued that s. 16(1)(b) of the CIPAA applied in this case since the subject matter of the adjudication decision was identical to that in the arbitration proceedings.

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Held (dismissing plaintiff's application):

(1) Clause 35.4 of the works contract had no application to the present facts. The parties did not refer the adjudication decision to arbitration. However, the dispute in relation to the claims and LAD were referred. Clause 35.4 could be invoked where the adjudication decision was disputed and only then the dispute would be referred to arbitration. Since that was not how the present arbitration was initiated, cl. 35.4 could not be engaged. (paras 18 & 19)

(2) Based on s. 16 of the CIPAA, an application for a stay of the adjudication decision and the enforcement of the adjudication decision may only be initiated in limited circumstances, *ie*, (i) where there was an application to set aside the adjudication decision under s. 15; or (ii) where there were concurrent proceedings on the same subject matter before either the arbitration or the court. In the context of s. 16(1)(a), although it was not expressly provided that the subject matter before the arbitration or the court was the same, it stands to reason that there must be some sameness or similarity, whatever the extent, to warrant a stay of the adjudication decision. This provision indirectly acknowledges the parties' decision that the final resolution of the issue be determined by some other forum, either by arbitration or by the court. Until that final resolution or determination, the decision of the adjudication binds. (paras 21 & 22)

(3) Although s. 16 of the CIPAA refers to a stay of the adjudication decision, in effect, it is a stay of the enforcement of the adjudication decision. Without such a stay, it would be open to the successful claimant to take the appropriate enforcement actions available since s. 28 provides that an adjudication decision may be enforced as if it is a judgment or order of the High Court. The circumstances under s. 16(1)(b) refers to the right of contracting parties or parties involved in the payment dispute to resort to concurrent proceedings. This right to refer a dispute or subject matter concurrently to an alternative dispute resolution forum is recognised under s. 37. (paras 23 & 24)

(4) Section 16(2) vests the court with discretion whether to grant the stay sought, whether to order the adjudicated amount or part of it to be deposited with the director of the KLRCA or to make any other order as the court thinks fit. Upon overcoming the threshold test in s. 16(1), the plaintiff still had to show how the discretion was to be exercised in its favour. (para 28)

(5) Stay should only be granted in exceptional circumstances and must necessarily refer to the financial status of the other party. The grant of any stay must always weigh in the primary object of CIPAA, *ie*, to ensure a speedy resolution of a payment dispute. When dealing with the particular complaints or grounds, cogent or credible evidence must be presented to show as to why stay of that adjudication decision ought nevertheless to be granted. This is an exercise of the court's discretion and the probable inability of repayment that may follow from concurrent court or arbitration proceedings which are valid factors to be weighed. (paras 32 & 47)

(6) The purpose of the CIPAA is to ensure that successful claimants are paid and paid promptly even though the adjudication decisions are provisional in nature. The adjudicated sum must be paid failing which it is available to the successful claimant to consider the next appropriate course of action. Notwithstanding these provisions, the court retains the power to grant a stay of the enforcement of the adjudication decision. On the facts, the plaintiff did not offer any reason, cogent or worthy of examination, to warrant a stay. As decided in the adjudication decision, the plaintiff should pay the defendant. (paras 56, 58 & 59)

Case(s) referred to:

Bouygues (UK) Limited v. Dahl-Jensen [2000] BLR 522 ***(refd)***

Brodyn Pty Ltd t/as Time Cost and Quality v. Philip Davenport and Dasein Constructions Pty Ltd [2004] NSWCA 394 ***(refd)***

Grosvenor Constructions (NSW) Pty Ltd (in administration) v. Joseph Musico, Rosemary Musico, Luigi Genua and Rose Genua [2004] NSWSC 344 ***(refd)***

Harlow & Milner Ltd v. Mrs Linda Teasdale [2006] EWHC 1708 ***(refd)***

Pioneer Cladding v. John Graham Construction Limited [2013] EWHC 2954 ***(refd)***

Wimbledon Construction Company 2000 Limited v. Derek Vago [2005] EWHC 1086 ***(refd)***

WY Steel Construction Pte Ltd v. Osko Pte Ltd [2013] SGCA 32 ***(refd)***

Legislation referred to:

Companies Act 1965, s. 218

Construction Industry Payment and Adjudication Act 2012, ss. 13, 15, 16(1)(a), (b), (2), 28, 37

Building and Construction Industry Security of Payment Act 2004 [Sing], s. 16

Rules of the Supreme Court [UK], O. 47

For the plaintiff - R Mohana Krishnan (Prem Ramachandran with him); M/s Kumar Partnership

For the defendant - Gananathan Pathmanathan (Simrenjeet Singh with him); M/s Gananathan Loh

Reported by Kumitha Abd Majid

JUDGMENT

Mary Lim J:

[1] By contract dated 7 May 2008 the plaintiff, as "employer" employed the defendant as "contractor" to carry out the renovation and refurbishment of the exterior and interior of Terminal 3, Lapangan Terbang Sultan Abdul Aziz Shah, Subang, Selangor (the works contract). The defendant's last three claims; Certificates Nos. 9, 10A and the Final Account Certificate No. 11 were not paid by the plaintiff. These three certificates had been certified by the architect and accepted by the plaintiff on 19 January 2011.

[2] On 19 June 2014, the defendant served a payment claim in respect of the three certificates on the plaintiff pursuant to the Construction Industry Payment and Adjudication Act 2012 (Act 746) (CIPAA). The sum claimed inclusive of interest was RM2,603,390.47. The plaintiff issued a payment response dated 26 June 2014 where it disputed the defendant's claim on the ground that the plaintiff had a valid LAD claim against the defendant for late completion of the works as the Certificate of Completion and Compliance (CCC) was only issued on 2 November 2011. The plaintiff claimed that it was entitled to set off a sum of RM3,201,000 for the late completion of the works calculated at the rate of RM3,000 per day for 1,067 days: from 1 December 2008 to 2 November 2011. A Certificate of Non-Completion dated 4 March 2010 was produced in support of this contention.

[3] A notice of adjudication was issued on 17 July 2014 and on 24 November 2014, an adjudicator was appointed. In its adjudication claim (and later in its adjudication reply), aside from justifying its right to the sum claimed, the defendant relied on cl. 23.1 of the underlying contract to support its contention that the plaintiff had no right of set off available for the LAD claim.

[4] On 25 February 2015, the adjudication decision was delivered. On 26 February 2015, a correction of the adjudication decision was published. In that corrected adjudication decision, the defendant's claim was allowed whereas the plaintiff's cross claim for the LAD was dismissed. In the course of his decision, the learned adjudicator agreed with the defendant that "... while the employer may be entitled to liquidated damages against the contractor for non-completion of the works within the time set for completion, cl. 23.1 prohibits such set off in adjudication proceedings". He found that the plaintiff's liquidated damages claim "ought to be treated as a separate and distinct contract … The right of the employer to liquidated damages is not lost. It is only not subject to set off in adjudication and must therefore be pursued separately". He agreed with the defendant and felt "constrained to decline the respondent's contention that it has jurisdiction to determine liquidated damages as a cross-claim".

[5] It is a matter of record that there were concurrent arbitration proceedings. The arbitration proceedings were initiated by the defendant on 7 August 2014 with the plaintiff issuing a cross notice of arbitration on 27 August 2014.

[6] In its points of claim, the defendant not only claimed for the same sum that was claimed in the adjudication claim, it was claimed on the same basis. The defendant went on to challenge *inter alia* the plaintiff's notice of non-completion, that it was the plaintiff who was in delay; and that it was the plaintiff who was in breach of the works contract.

[7] In defence and counterclaim, the plaintiff not only claimed for the LAD, it also alluded to deliberations between the parties which led to the parties agreeing "to forego their respective claims/potential claims against each other and to put this entire matter behind them". The plaintiff claimed that the reason why there was no payment of the three certificates was because the parties had supposedly reached some compromise when the plaintiff had presented its own LAD claim on the defendant. Because the LAD claim would have extinguished the defendant's claims on the three certificates, the parties had supposedly decided not to pursue their respective claims. Hence, the defendant's adjudication claim came as a surprise. The plaintiff saw that as evidence of the plaintiff reneging on its agreement. Consequently, the plaintiff decided to now pursue the LAD claim.

[8] The plaintiff claimed that the "in breach of this compromise, the claimant has now sought to claim what monies it alleges are due and owing to it under the works contract; and the respondent further states that as parties had entered into this compromise settlement, any claims that parties may have against each other have been extinguished".

[9] The "alleged agreement or compromise settlement on the claimant's part to forego or extinguish its claims against the respondent" was specifically denied.

[10] The parties agreed on the appointment of Mr Chang Wei Mun as the sole arbitrator. This was around 13 November 2014. The defendant filed a notice of cross arbitration. The arbitration is scheduled for hearing on 15 August 2015.

[11] The present application for stay was occasioned by the defendant's issuance of a notice under s. 218 Companies Act 1965. The defendant was seeking to enforce the adjudication decision and collect on monies awarded to the defendant. The stay is until the subject matter of the dispute between the parties is determined by arbitration; arbitration being the final determiner of the dispute. According to the submissions, it is envisaged that the arbitration would conclude sometime around October 2015 with a decision to follow at a date uncertain.

[12] These are the relevant cause papers: A

(i) originating summons – encl. 1

(ii) plaintiff's affidavit in support – encl. 2

(iii) defendant's affidavit in reply – encl. 4

(iv) plaintiff's corrective affidavit – encl. 5 B

(v) plaintiff's affidavit in reply – encl. 6

(vi) defendant's affidavit in reply (2) – encl. 11

[13] By this originating summons, the plaintiff is seeking: C

> that any and all enforcement and/or execution and/or any such further proceedings (including winding up proceedings) in respect of the adjudication decision made and published on 25.2.2015 and as corrected and published on 26.2.2015 be stayed until the final determination of pending arbitration proceedings between the parties under subsection 16(1)(b) of CIPAA and/or inherent powers of the Court pursuant to Order 92 of the Rules of Court 2012 and/or pursuant to clause 35.4 of the Works Contract. D

[14] These are the reasons or grounds cited as warranting a stay of the enforcement of the adjudication decision as found at paras. 18 to 28 of the affidavit filed in support of the originating summons: E

(i) the plaintiff relies on cl. 35.4 of the works contract; that because there is reference to arbitration, the adjudication decision is not final and binding and cannot be enforced;

(ii) that because the subject matter of the adjudication decision is identical to that in the arbitration proceedings, s. 16(1)(b) of CIPAA 2012 applies; F

(iii) that there is no prejudice if a stay is granted;

(iv) that the plaintiff is by no means insolvent as it is a substantial company with an established reputation and it is in a position to satisfy any order as to payment of costs that may be made during arbitration in addition to such sums that is stated to be due to the defendant pursuant to the adjudication decision; and G

(v) the arbitration proceedings are scheduled for conclusion sometime in mid October 2015 with a decision expected to be delivered not long after that. The defendant would therefore not be deprived of the fruits of the adjudication decision "for an inordinate amount of time, which in any case may be set off by the plaintiff's counterclaim amount for LAD which is in far excess of the defendant's claim". H I

[15] As is readily apparent, there are no contentions or allegations made about the defendant's liquidity or potential difficulties in repaying the adjudication sum; or of paying the plaintiff the LAD sum. The plaintiff simply takes the position that so long as there is a pending concurrent proceeding, in this case, arbitration dealing with the same subject matter and that arbitration decision is final to the question, then the stay must be granted – see para. 8 of the plaintiff's affidavit in reply in encl. 6.

[16] With respect, the court disagrees that this is sufficient.

[17] But, first, let me deal with the question of how the adjudication and arbitration proceedings interface with each other. The plaintiff has suggested that because of the operation of cl. 35.4 of the works contract, the application for stay must be granted. This argument is raised in relation to the argument on the existence of concurrent proceedings.

[18] Having examined cl. 35.4 of the works contract, and that really is only for the purpose of understanding how the dispute has gone to arbitration; I am of the view that the clause actually has no application to the present facts. This is because the arbitration is not initiated by reason of cl. 35.4 but by reason of cls. 35.1 and 35.5. This is cl. 35 of the works contract:

35.0 Adjudication And Arbitration

35.1 Reference to adjudication is a condition precedent to arbitration for disputes under cl. 31.4. The parties by written agreement are free to refer any other disputes to adjudication. Any dispute under cl. 31.4 after the date of practical completion shall be referred to arbitration under cl. 35.5.

35.2 Where a party requires a dispute or difference under cl. 35.1 to be referred to adjudication, such disputes or differences shall be referred to an adjudicator to be agreed between the parties. If after the expiration of twenty one (21) days from the date of the written notice to concur on the appointment of the adjudicator, there is a failure to agree on the appointment, the party initiating the adjudication shall apply to appoint an adjudicator, and such adjudicator so appointed shall be deemed to be appointed with the agreement and consent of the parties to the contract.

35.3 Upon appointment, the adjudicator shall initiate the adjudication in accordance with the current edition of the modification or revision to such rules.

35.4 If a party disputes the adjudicator's decision, he shall nevertheless be bound by the adjudicator's decision until practical completion but shall give a written notice to the other party to refer the

dispute which was the subject of the adjudication to arbitration within six (6) weeks from the date of the adjudicator's decision. The adjudicator's decision shall be final and binding on the parties if the dispute on the adjudicator's decision is not referred to arbitration within the stipulated time. The parties may settle any dispute with the adjudicator's decision by written agreement between the parties or by arbitration under cl. 35.5.

35.5 In the event that any dispute or difference arises between the employer and contractor, either during the progress or after completion or abandonment of the works regarding:

35.5(a) any matter of whatsoever nature arising under or in connection with the contract;

35.5(b) any matter left by the contract to the discretion of the employer;

35.5(c) the withholding by the employer of any certificate to which the contractor may claim to be entitled to;

35.5(d) the rights and liabilities of the parties under cls. 26.0, 27.0, 32.0 or 33.0; or

35.5(e) the unreasonable withholding of consent or agreement by the employer or contractor, then such disputes or differences shall be referred to arbitration.

[19] It is obvious that neither the plaintiff nor defendant referred the adjudication decision to arbitration. What was referred is the dispute between the parties on the claims and LAD. Clause 35.4 is only properly invoked where the adjudication decision is itself disputed; and then that dispute is referred to arbitration. Since that was not how the present arbitration was initiated, cl. 35.4 is simply not engaged. The dispute which is now before the arbitral tribunal is pursuant to cls. 35.1 and 35.5.

[20] Coming back to the substantive issue of stay, the plaintiff's application is made pursuant to s. 16 of CIPAA 2012 which reads:

Stay of adjudication decision

16. (1) A party may apply to the High Court for a stay of an adjudication decision in the following circumstances:

(a) an application to set aside the adjudication decision under section 15 has been made; or

(b) the subject matter of the adjudication decision is pending final determination by arbitration or the court.

(2) The High Court may grant a stay of the adjudication decision or order the adjudicated amount or part of it to be deposited with the Director of the KLRCA or make any other order as it thinks fit.

[21] From a reading of s. 16, it would appear that an application for a stay of the adjudication decision and thereby the enforcement of the adjudication decision may only be initiated in somewhat limited circumstances. First, where there is an application to set aside the adjudication decision under s. 15; or second, where there are concurrent proceedings on the same subject matter before either arbitration or the court.

[22] In the context of s. 16(1)(a), although it is not expressly provided that the subject matter before arbitration or the court is the same, it stands to reason that there must be some sameness or similarity, whatever the extent, to warrant a stay of the adjudication decision. Aside from avoiding any potential conflict in findings and decisions from adjudication and arbitration or the court, one is reminded of one of the central themes of CIPAA which is to provide temporary finality to payment disputes between parties. This provision indirectly acknowledges the parties' decision that the final resolution of the issue or matter at hand be determined by some other forum, be it arbitration or by the court. Until that final resolution or determination, the decision of the adjudication binds.

[23] Another point to note is that although s. 16 refers to a stay of the adjudication decision, in effect it is a stay of the enforcement of the adjudication decision. Without such a stay, it would be open to the successful claimant to take the appropriate enforcement actions available as s. 28 clearly provides that an adjudication decision may be enforced as if it is a judgment or order of the High Court:

> Enforcement of adjudication decision as judgment
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> 28. (1) A party may enforce an adjudication decision by applying to the High Court for an order to enforce the adjudication decision as if it is a judgment or order of the High Court.

[24] Further, this provision for stay recognises the right to resort to concurrent proceedings as a real and substantive choice. The circumstance under s. 16(1)(b) refers to the right of contracting parties or parties involved in the payment dispute to resort to concurrent proceedings. This right to refer a dispute or subject matter concurrently to an alternative dispute resolution forum is recognised under s. 37:

> Relationship between adjudication and other dispute resolution process
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> 37. (1) A dispute in respect of payment under a construction contract may be referred concurrently to adjudication, arbitration or the court.
>
> (2) Subject to subsection (3), a reference to arbitration or the court in respect of a dispute which is being adjudicated shall not bring the adjudication proceedings to an end nor affect the adjudication proceedings.

(3) An adjudication proceeding is terminated if the dispute being adjudicated is settled by agreement in writing between the parties or decided by arbitration or the court.

[25] In both cases under sub-s. 16(1), the other proceedings be it for setting aside of the adjudication decision or, arbitration or court proceedings in relation to the same subject matter, are pending and the stay is really to preserve some *status quo*. But, it is only under either of these two situations that an application for stay may be lodged and not otherwise. This limited right is consistent with the whole scheme of CIPAA 2012, which is to afford speedy disposal of payment disputes on a temporary note of finality. During this time of pendency, be it of an application to court to set aside the adjudication decision, or where the final determination by another arbiter or court is awaited, the adjudication decision is binding on the parties. Compliance with the adjudication decision is a given and part of the rules of the game in this industry and what CIPAA is all about in the first place.

[26] This view is supported by the provisions of s. 13 which states:

Effect of adjudication decision

13. The adjudication decision is binding unless -

(a) it is set aside by the High Court on any of the grounds referred to in section 15;

(b) the subject matter of the decision is settled by a written agreement between the parties; or

(c) the dispute is finally decided by arbitration or the court.

[27] Since the defendant has itself issued a notice of arbitration in which it has raised the very same matters that it had raised in the adjudication, sub-s. 16(2) operates. That is not to say that simply because the dispute or subject matter of the adjudication decision is now in the arbitration mode regime, the grant of stay is automatic. It is not, let alone as of right or as a matter of course. Being in arbitration merely puts the plaintiff's case as one within s. 16 for consideration; or one which has crossed the threshold. The existence of concurrent proceedings merely prequalifies the plaintiff for this application.

[28] At all times, the court retains the discretion as to whether or not to grant a stay and that is obvious from the language and terms of s. 16. In fact, sub-s. 16(2) vests the court with discretion whether to grant the stay sought; whether to order the adjudicated amount or part of it to be deposited with the Director of KLRCA; or make any other order as the court thinks fit. Upon overcoming the threshold test in sub-s. 16(1), the plaintiff still has to show how the discretion is to be exercised in its favour.

[29] How then is an application for stay to be considered; should it be on the same general principles applicable where there is an appeal; or should the exercise of discretion be along the same principles when dealing with a Fortuna injunction?

[30] It is this court's view that in the exercise of discretion of whether to grant the stay or make an order for payment to the Director of KLRCA, the court must weigh into play in a fairly extensive way, the object of CIPAA; and that it is for a speedy disposal of a payment dispute. This is regardless of the fact that this is a payment dispute that arose in the final days of the construction contract, a point which the parties appear to have no issue with and there is no challenge in this respect anyway. Having gone through the hoops of adjudication, there is now decision in the defendant's favour.

[31] This court is of the view that the defendant should not be deprived of the very benefit of why it resorted to adjudication in the first place; save if satisfactory reasons are present for a stay of that adjudication decision.

[32] It is my further view that stay should only be granted in exceptional circumstances; and such circumstances must necessarily refer to the financial status of the other party. The merits of the case before the arbitration or the court; or even the chances of success in setting aside the adjudication decision are not relevant considerations. The grant of any stay must always weigh in the primary object of CIPAA 2012; that it is to ensure a speedy resolution of a payment dispute; that it is to inject much needed cash flow into the contractual arrangements between parties that saw progressive payments of claims as the recognised and accepted way of doing business in construction contracts. It would be futile to encourage parties to resort to adjudication and then deprive a successful claimant of its claim by staying the access to the cash simply because there is another proceeding of the nature described in sub-s. 16(1) which is pending. The whole concept of temporary finality would be lost and the object of the Act defeated if such was the consideration.

[33] I find support for this view that adjudication decisions must be peremptorily enforced in several decisions from the United Kingdom and from the Court of Appeal in Singapore. For instance the decisions of *Bouygues (UK) Limited v. Dahl-Jensen* [2000] BLR 522; *Wimbledon Construction Company 2000 Limited v. Derek Vago* [2005] EWHC 1086; *Harlow & Milner Ltd v. Mrs Linda Teasdale* [2006] EWHC 1708; and *Pioneer Cladding v. John Graham Construction Limited* [2013] EWHC 2954. These cases were also discussed in the Singapore Court of Appeal's decision of *WY Steel Construction Pte Ltd v. Osko Pte Ltd* [2013] SGCA 32.

[34] In the first case of *Bouygues (UK) Limited v. Dahl-Jensen* [2000] BLR 522, Dyson J, at first instance, had granted Dahl-Jensen summary judgment to enforce an adjudicator's decision even though it was accepted that the adjudicator's decision contained an error. This decision was upheld by the Court of Appeal. But, because *Dahl-Jensen* was in insolvent liquidation, the Court of Appeal imposed a stay of execution. At para. 35 of his judgment, Lord Justice Chadwick said:

> In circumstances such as the present where there are latent claims and cross-claims between parties, one of which is in liquidation, it seems to me that there is a compelling reason to refuse summary judgment on a claim arising out of adjudication which is necessarily provisional. All claims and cross-claims should be resolved in the liquidation in which full account can be taken and a balance struck. That is what rule 4.90 of the Insolvency Rules 1986 requires.

[35] Next, is a series of decisions by Coulson J, starting with *Wimbledon Construction Company 2000 Limited v. Derek Vago* [2005] EWHC 1086. After going through various decisions which I have here taken the liberty of providing their full citation; and the position under O. 47 of the Rules of the Supreme Court which is said to remain very much part of the CPR by operation of Part 50, the court concluded that while often each case must turn on its own facts:

> ... it does seem to me that there are a number of clear principles which should always govern the exercise of the court's discretion when it is considering a stay of execution in adjudication enforcement proceedings. Those principles can be set out as follows:
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> (a) Adjudication (whether pursuant to the 1996 Act or the consequential amendments to the standard forms of building and engineering contracts) is designed to be a quick and inexpensive method of arriving at a temporary result in a construction dispute.
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> (b) In consequence, adjudicators' decisions are intended to be enforced summarily and the claimant (being the successful party in the adjudication) should not generally be kept out of its money.
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> (c) In an application to stay the execution of summary judgment arising out of an Adjudicator's decision, the Court must exercise its discretion under Order 47 with considerations (a) and (b) firmly in mind (see *AWG Construction Services v. Rockingham Motor Speedway* [2004] EWHC 888).
>
> (d) The probable inability of the claimant to repay the judgment sum (awarded by the Adjudicator and enforced by way of summary judgment) at the end of the substantive trial, or arbitration hearing, may constitute special circumstances within the meaning of Order 47 rule 1(1)(a) rendering it appropriate to grant a stay (see *Herschell Engineering Limited v. Breen Property Limited*, unreported 28th July 2000).

A (e) If the claimant is in insolvent liquidation, or there is no dispute on the evidence that the claimant is insolvent, then a stay of execution will usually be granted (see *Bouygues (UK) Limited v. Dahl-Jensen* [2000] BLR 522 and *Rainford House Limited v. Cadogan Limited*, unreported 13 February 2001).

B (f) Even if the evidence of the claimant's present financial position suggested that it is probable that it would be unable to repay the judgment sum when it fell due, that would not usually justify the grant of a stay if:

(i) the claimant's financial position is the same or similar to its financial position at the time that the relevant contract was made (see *Herschell Engineering Limited v. Breen Property Limited*); or

(ii) the claimant's financial position is due, either wholly, or in significant part, to the defendant's failure to pay those sums which were awarded by the adjudicator (see *Absolute Rentals v. Glencor Enterprises Limited*, unreported 16th January 2000).

[36] In the next case of *Harlow & Milner Ltd v. Mrs Linda Teasdale* [2006] EWHC 1708, although Coulson J was dealing with an application for an order of sale arising out of the final charging order and the defendant was urging the court to stay the order which was refused by His Lordship, the views of the court are nevertheless insightful. The matter between the parties had long passed the stage of enforcement of the adjudication decision; the court had given leave for enforcement of the adjudication decision; both interim and final charging orders had been issued by the court; the appeal against the final charging order had been dismissed by the Court of Appeal; and the case had reached the final stage of sale. As described by the court, the application "comes at the end of a long road which they have been obliged to take in order to enforce an adjudicator's decision in their favour dated as long ago as the 19 May 2005".

[37] The court painstakingly examined the principles addressed before taking the opinion that if stay were granted, it may just "undermine the adjudication process"; that the fact of an on-going arbitration is a "wholly insufficient ground on which to oppose the application". The court referred to its earlier judgment rendered in the application for a final charging order where the court had said:

> The Defendant is not entitled to ignore the judgment of this court and to delay her payment to the Claimant in the hope that 'something may turn up'. Her solicitor's suggestion that the Charging Order should in some way be suspended, until the result of the arbitration is known, would wholly undermine the adjudication process. If it were right, it would mean that any party who was on the receiving end of an adjudicator's decision could, if they wanted to avoid the result, commence arbitration proceedings against the successful party, and then

> argue that the adjudicator's decision should abide the eventual outcome of that arbitration. It was precisely to avoid such delaying tactics that the statutory adjudication process was created in the first place.

[38] The court found that the main reason and principle for its decision as set out above "... is equally applicable to the present claim for an order for sale final". In support of his view, the court referred to several cases which showed the prevailing trend and approach of the courts in matters concerning stay of adjudication pending arbitration or court proceedings, and found that the approach was no different from the present court:

> ... there are a number of authorities which make it clear that a party who is ordered to make a payment, pursuant to an adjudicator's decision, cannot seek to avoid making such payment by setting off other claims that it has or might have: see, for example, the two decisions of His Honour Judge Gilliland (sitting as the TCC judge in Salford) in *MJ Gleeson Group plc v. Devonshire Green Holding Ltd* (19th March 2004) and *David McLean Contractors Ltd v. The Albany Building Ltd* (10th November 2005). More recently, in *Interserve Industrial Services Ltd v. Cleveland Bridge (UK) Ltd* [2006] EWHC 741, Jackson J held that Cleveland Bridge could not set off, against an adjudication decision that it had lost, its actual or anticipated recovery in another, later adjudication between the same parties.

[39] The court's further observation from these cases is also most instructive:

> Standing back from the authorities for a moment, it is worth considering what the effect would be if I acceded to the Defendant's request not to make the order for sale because of the on-going arbitration. It would mean that any unsuccessful party in adjudication would know that, if they refused to pay up for long enough, and started their own arbitration, they could eventually render the adjudicator's decision of no effect. It would be condoning, in clear terms, a judgment debtor's persistent default, and its complete refusal to comply with the earlier judgment of the Court. For those reasons, it is a position which I am simply unable to adopt.

[40] Then, came the decision of *Pioneer Cladding Limited v. John Graham Construction Limited* [2013] EWHC 2954 (TCC) where there were concurrent arbitration proceedings. In this decision, Coulson J summarised the relevant principles propounded in his own previous decision in *Wimbledon Construction Company 2000 Limited v. Derek Vago* (*supra*), before carefully evaluating and determining the three grounds relied on to stay the execution of the adjudication decision.

[41] In respect of the issue as to whether it was probable that Pioneer, the applicant before the court who stood to benefit from the net effect of two adjudication decisions would be unable to repay the amount ordered if that

was the outcome of the arbitration, Coulson J examined the "considerable volume of evidence" and found the proposition "good". The court found that Graham, the respondent, had made out its case that Pioneer is insolvent and/or would be unable to repay if stay was not granted.

[42] In respect of the issue as to whether Pioneer's financial position was the same or similar to the financial position of which Graham was aware at the time that the contract was made, the court examined the relevant events and documents before concluding that Graham had "robustly vetted" Pioneer. The court further found that Graham had in the absence of any proper accounts or independent financial information, done the best that they could. The court was also satisfied that Graham had entered into the subcontract with Pioneer "on a false premise"; and that the various exchanges between the parties had demonstrated to Graham that Pioneer was a "substantial company and financially stable"; but that was "incorrect" as "Pioneer's turnover (then and now) remains uncertain, they were not making any significant profit, as the subsequent accounts demonstrate. They did not have the cash reserves that they were suggesting". The court then found that:

> In all those circumstances, Pioneer cannot defeat Graham's application for a stay on the basis that Graham knew what they were getting into when they sub-contracted with Pioneer. On the contrary, they had no proper idea, because Pioneer misled them. Accordingly, I decide the second issue (paragraph 11(ii) above) in Graham's favour.

[43] On the third and final ground that Pioneer are only in their current financial position because of Graham's failure to pay, the court once again examined the various projects that Pioneer was engaged in evidence before concluding:

> 35 In my view, all of this evidence demonstrates a clear and unambiguous pattern. Pioneer never had sufficient cash reserves to run their business properly. They were always robbing Peter to pay Paul. For Pelikaan, for MAF, and for Graham, they entered into large sub-contracts and were then unable to pay for materials, with the consequence that the contractors had to buy the materials on their behalf, and in the end, their sub-contracts were terminated.
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> 36 It is plain, both as a matter of chronology and as a matter of common sense, that Pioneer's failure to perform for Pelikaan and for MAF had nothing whatsoever to do with Graham's failure to pay. For example, the Pelikaan failures in November 2011 were unconnected to any default in payment by Graham because those defaults did not occur, even on Pioneer's case, till late 2012. The same appears to be the case in relation to MAF too. Moreover, the problems with *Pioneer*'s general performance echoed the warning that Baris had originally given about Pioneer's cashflow difficulties as long ago as May 2011 (see paragraph 20 above).

37 Accordingly, I reject the suggestion that Pioneer's financial difficulties were caused or substantially contributed to by Graham. On the contrary, I consider that those financial problems were inherent in Pioneer's business model and that Pioneer's cashflow difficulties stem back to a time before they even sub-contracted with Graham. I therefore decide the third issue at paragraph 11 above in Graham's favour.

[44] Accordingly, the order of stay was granted:

38 For those reasons, I consider that this unusual case is one of those rare occasions when, notwithstanding the relatively high hurdles noted in *Wimbledon v. Vago*, the defendant has made out a good case for a stay of execution. I therefore exercise my discretion against Pioneer and, although I give judgment in the sum of £188,665.49 in their favour, I stay the execution of that judgment pending the outcome of the ongoing arbitration.

[45] It must be pointed that there is no similar provision to our s. 16 under the UK regime on adjudication of payment disputes under the Housing Grants, Construction and Regeneration Act 1996. Be that as it may, the principles and views are no less helpful since the underlying response to the problem of payment disputes in the construction industry is the same; and that is through interim resolution by adjudication.

[46] From the above English authorities, it can be seen that when dealing with an application for stay of an adjudication decision, the courts always have foremost in their consideration the temporariness of the binding nature of adjudication decisions and that such decisions must be peremptorily enforced. Otherwise, the whole object to adjudication would be undermined and defeated.

[47] When dealing with the particular complaints or grounds, cogent or credible evidence must be presented to show why stay of that adjudication decision ought nevertheless to be granted. This is an exercise of the court's discretion and the probable inability of repayment that may follow from concurrent court or arbitration proceedings are valid factors to be weighed. In cases of allegations of financial hardship brought about by the other contracting or opposing party, the court ought to examine the real circumstances as was done in *Pioneer Cladding Limited v. John Graham Construction Limited*.

[48] These decisions were discussed by the Court of Appeal of Singapore in *WY Steel Construction Pte Ltd v. Osko Pte Ltd* [2013] SGCA 32, which *inter alia* had to deal with the issue of the court's jurisdiction to stay enforcement of an adjudication decision. It must again be pointed out that there is also no equivalent provision of s. 16 under the Building and Construction Industry Security of Payment Act 2004 of Singapore. For the same reasons, the decision is no less important and of useful guide on the approach that the court should adopt when dealing with applications for stay of adjudication decisions.

[49] In this case, the application to set aside the adjudication decision was refused by the High Court. Pending the hearing of the setting aside application, WY Steel had paid the whole of the adjudicated sum into court. WY Steel was before the Court of Appeal on its appeal against that dismissal. WY Steel sought to stay the enforcement of the adjudication decision (the sum already paid into court be retained) pending the disposal of separate proceedings that it had initiated against the respondent to recover the amount that it contended was properly due to it.

[50] The appeal was dismissed. At the same time, the Court of Appeal ordered that a portion of the adjudicated sum which had been paid into court be released to the respondent to enable the respondent to settle some of its outstanding financial obligations. The remaining sum was ordered to be retained pending the court's determination of the application for stay.

[51] In the application for stay pending determination of separate court proceedings, the appellant urged the court to grant a stay of enforcement on the ground that the respondent was in financial difficulty and therefore might not be able to repay the adjudicated sum if the respondent subsequently failed to successfully defend the appellant's claim in those separate proceedings. In determining the relevant principles at play, the Court of Appeal in a judgment delivered by the Chief Justice of Singapore said:

> [56] Ordinarily, if an application to set aside an adjudication determination is refused, the adjudication determination will be enforced and the adjudicated amount earlier paid into court pending the determination of the setting-aside application (see s. 27(5) of the Act) will be paid out to the successful claimant. In the present case, WY Steel urged us to grant a stay of enforcement of the Adjudication Determination pending the disposal of Suit 474/2012 on the grounds that there was evidence that Osko was in financial difficulty and therefore might not be able to repay the Adjudicated Sum if it subsequently failed to successfully defend the claim that WY Steel had brought against it in that suit. As mentioned earlier (see [1] and [11] above), WY Steel had earlier paid the whole of the Adjudicated Sum into court pending the hearing of OS 484/2012. At the close of the hearing of this appeal, we ordered as an interim measure that part of the Adjudicated Sum was to be released to Osko to enable it to settle six lawsuits in which it was the defendant, together with the related legal costs. As mentioned at [2] above, we did not think there was sufficient evidence before us at that time to enable us to dispose of WY Steel's stay application. We accordingly directed WY Steel to file an affidavit within seven days explaining why a stay of enforcement should be granted in respect of the remainder of the Adjudicated Sum ... and also gave Osko seven days thereafter to file a reply affidavit.
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> [57] ...
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> [58] ...

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> [59] We have said above that the purpose of the Act is to ensure (*inter alia*) that even though adjudication determinations are interim in nature, successful claimants are paid. To this end, under s. 22(1), the respondent must pay the adjudicated amount either within seven days after being served with the adjudication determination (see s. 22(1)(a)), or by the deadline stipulated by the adjudicator (see s. 22(1)(b)). The claimant can suspend work (see s. 26(1)(d)) or take a lien on goods supplied (see s. 25(2)(d)) if the respondent fails to pay. If the respondent intends to apply for a review of the adjudication determination, he must first pay the adjudicated amount to the claimant: see s. 18(3). If the respondent wants to set aside the adjudication determination, he must pay into court as security the unpaid portion of the adjudicated amount: see s. 27(5). This requirement is repeated in O. 95 r. 3(3) of the Rules of Court (Cap. 322, R 5, 2006 Rev Ed). These provisions all point to one thing: where a claimant succeeds in his adjudication application, he is entitled to receive the adjudicated amount quickly and cannot be denied payment without very good reason.

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> [60] Notwithstanding these provisions, it is clear that the court retains the power to stay the enforcement of an adjudication determination. In our judgment, this follows from the provisional nature of an adjudication determination. Such a determination is not a final determination of the parties' rights. Rather, it establishes a position with finality for the present, and this position continues until the rights of the parties are eventually and finally determined or resolved. It follows from this that the court retains the discretion to order a stay of enforcement of an adjudication determination where it is necessary to do so in order to secure the ends of justice. There are no local cases on point on the exercise of this discretion, although we can take reference from foreign cases, bearing in mind the scheme of the Act and our Parliament's intention.

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[52] Because there were no local cases on point, the Court of Appeal examined the position in New South Wales, Australia; particularly the decision in *Brodyn Pty Ltd t/as Time Cost and Quality v. Philip Davenport and Dasein Constructions Pty Ltd* [2004] NSWCA 394 and *Grosvenor Constructions (NSW) Pty Ltd (in administration) v. Joseph Musico, Rosemary Musico, Luigi Genua and Rose Genua* [2004] NSWSC 344; and the English cases discussed earlier before concluding at para. 68 as follows:

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> [68] It is evident from these cases that where there is objective evidence that the successful claimant is in fact insolvent, a stay of enforcement would usually be appropriate. However, as is evident from *Brodyn*, evidence of financial difficulties which fall short of actual, objective insolvency - even if these difficulties are serious - will not usually suffice.

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[53] According to the Court of Appeal, a stay of enforcement may ordinarily be justified:

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> [70] …where there is clear and objective evidence of the successful claimant's actual present insolvency, or where the court is satisfied on a balance of probabilities that if the stay were not granted, the money paid

A to the claimant would not ultimately be recovered if the dispute between the parties were finally resolved in the respondent's favour by a court or tribunal or some other dispute resolution body. Further, we agree with HHJ Coulson QC in *Vago* that a court may properly consider whether the claimant's financial distress was, to a significant degree, caused by the respondent's failure to pay the adjudicated amount and, also, B whether the claimant was already in a similar state of financial strength or weakness (as the case may be) at the time the parties entered into their contract.

[54] One of the arguments that WY Steel ran before the court was that the approach adopted by the court would unduly favour the successful C claimant in the adjudication and place the unsuccessful respondent at risk. This also appears to put such a successful claimant in a "better position than a party who had succeeded at a trial but where an appeal was pending". To these arguments, the Court of Appeal responded as follows:

D [71] ...Whether that is true or not, the comparison is not one that is apt. An adjudication determination is provisional in the sense that it may ultimately be reversed if it is challenged in a court or tribunal or some other dispute resolution body. However, as far as the rights of the parties to the adjudication are concerned, to the extent that the adjudication determination remains intact pending any such challenge, it has the effect of absolutely and conclusively determining the parties' rights until E and unless it is eventually reversed in accordance with the provisions of the Act - see [13] and [18] above. Hence, while we are prepared to recognise the possibility of granting a stay of enforcement of an adjudication determination because of the possibility of a different outcome emerging eventually, a stay will not readily be granted having F regard to the overall purpose of the Act, which is precisely to avoid and guard against pushing building and construction companies over the financial precipice.

[55] The Court of Appeal went on to apply the principles to the facts and in doing so, dismissed WY Steel's stay application.

G **[56]** It is my view that the overarching concern at this point must be the purpose or object of CIPAA. Just as it was regarded in the English, Australian and Singapore equivalent contexts, the Malaysian context of CIPAA is no different. The purpose of the Act is to ensure that successful claimants are paid and paid promptly even though the adjudication decisions H are provisional in nature. The defendant must pay the adjudicated sum failing which it is available to the successful claimant to consider the next appropriate course of action. Notwithstanding these provisions, the court retains the power to grant stay of the enforcement of the adjudication decision. It does so in order to secure the ends of justice.

I **[57]** Therefore, to allow stay to be explored in any other circumstances may be argued to stymie the efforts of Parliament where payment disputes in construction contracts are concerned. It may even render the laudable benefits which the Act is intended to bring, illusory and unachievable.

[58] Here, the court finds that the plaintiff has simply not offered any reason, cogent or worthy of examination, to warrant a stay. As amply shown in case law from other jurisdictions, reasons must be offered. Each of those reasons will be examined. If those reasons pertain to the financial status of the defendant as one of doubtful solvency or near insolvency, the court still needs to examine why that may be the case. In our present case, the plaintiff has not even offered those reasons for the court's consideration. Instead, it has offered evidence of its own financial status; that it is in the position to pay up.

[59] With respect, that is not relevant; and if that is the case, then the plaintiff indeed should pay, as decided in the adjudication decision. In any case, the defendant has offered sufficient evidence of its own solvency; and the court is satisfied.

[60] The application is accordingly dismissed. The parties have agreed that in view of the nature of the case, that this is a first case under the stay provisions of CIPAA, there should be no order as to costs. I agree and I commend both learned counsel for taking that position. Their arguments have ultimately been helpful to the court.